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No. 80-2150

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

DONALD FINNEGAN, *et al.*,
Petitioners,

v.

HAROLD E. LEU, *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE AND BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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MOTION BY THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS FOR LEAVE TO FILE A BRIEF AMICUS CURIAE IN SUPPORT OF RESPONDENTS

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) respectfully moves this Court for leave to file the accompanying brief *amicus curiae* in support of the position of the respondents in this case.

INTEREST OF THE AFL-CIO AND THE ISSUES TO BE COVERED IN THE AFL-CIO'S BRIEF AMICUS CURIAE

The AFL-CIO is a federation of 102 national and international unions with a total membership of 14,500,000 working men and women. This case presents a question concerning the scope of the Labor Management Reporting and Disclosure Act—whether that Act protects appointed union officials who actively campaign during a union election from discharge by the candidate they opposed if he is elected and replacement by appointees of that elected officer's own choice—that is of substantial importance in the administration both of that Act and

of the unions subject to its provisions. The Federation and its affiliates therefore have a concomitant interest in the outcome.

Consistent with that interest the attached brief *amicus curiae* is devoted to demonstrating: First, that there is a range of situations involving the discharge of union officials, each of which should be carefully distinguished from the others and evaluated on its own terms, and that the decision here should address only the variant before the Court—the discharge by a newly elected union administration of appointed union officials such as business agents; second, that it is wrong to read § 609 of the LMRDA, 29 U.S.C. § 529—which prohibits "discipline" based on exercise of a right protected by the Act—as reaching the discharge of such appointed union officials; and, third, that the pertinent legislative materials establish that a discharge of such an official who has been engaged in campaign activity does not "infringe" the free speech rights protected by § 101(a)(2) of the LMRDA, 29 U.S.C. § 411(a)(2). The sum of our presentation is that whatever may be the outcome in other contexts the discharges here were lawful.

CONCLUSION

For the above stated reasons this motion for leave to file a brief amicus curiae should be granted.

Respectfully submitted,

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

This brief *amicus curiae* is filed contingent on the granting of the foregoing motion for leave to file said brief. The interest of the AFL-CIO in this case is set forth in that motion.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case concerns the legality of discharges by a newly-elected chief union officer of certain of the union's business agents—officials who have substantial independence in carrying out tasks central to the union's responsibilities as exclusive collective bargaining agent.[1] The

[1] While the record upon the role of business agents here is not fully developed, it is established that the business agents have at least the following responsibilities: Negotiation of collective bargaining agreements, subject to final approval by the president (Jt. App. 11, 13); organizing (Jt. App. 13, 42); and processing and "resolving" grievances (Jt. App. 27). All of these tasks, by their very nature, involve daily interaction as representatives of the union with the outside world, including em-

union's bylaws it is undisputed grant the chief officer the authority to hire and fire the business agents. But the discharges, it is claimed, were "as a result of" (Jt. App. 5) those officials' campaign activities on behalf of the new officer's opponent, and for that reason, it is argued, the discharges violate § 101(a)(2) of the Labor-Management Reporting and Disclosure Act ("LMRDA"), § 29 U.S.C. § 411(a)(2), the Act's "free speech and assembly" provision. Thus the case before the Court presents one of several generic situations in which union officers and employees have claimed protection from discharge under § 101(a)(2) and the LMRDA's related remedial provisions, §§ 102 and 609, 29 U.S.C. §§ 412 and 529. It is therefore well to have in mind some of the major variations on this theme at the outset.

For example, *elected officers* removed from office by other officers because of policy disagreements with, or plans to oppose the candidacy of, those other officers have also claimed the protection of § 101(1)(a)(2). See, *e.g.*, *Wood v. Dennis*, 489 F.2d 849 (7th Cir. 1973), *cert. denied* 415 U.S. 960 (1974). One variant in the elected officer cases has involved removal of elected officers for their speech or campaign activities by vote of the membership at large or in a formal recall election, (*e.g.*, *Sheridan v. Carpenters Local No. 626*, 306 F.2d 152 (3rd Cir. 1962)), while another has concerned removal of persons who had been elected to their positions but who are not "officers" as that term is defined in § 3(n)

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ployers, union employees, and non-union employees, and a large measure of on-the-spot decision-making regarding the application of general union policy to particular, immediate situations. For example, while the union president is "the only one who can sign contracts in behalf of the local" (Jt. App. 13), he simply reviews the agreements "after the contracts have been concluded." (*Id.*). Because of the dynamic of negotiations, as a practical matter this structure empowers the actual negotiator to make decisions over the bargaining table concerning both substance and tactics which in most cases determine the final outcome of the negotiations.

of the LMRDA, 29 U.S.C. § 402(n) (*e.g.*, *Newman v. Local 1101, Communication Workers*, 570 F.2d 439 (2d Cir. 1978); *Maceira v. Pagan*, 649 F.2d 8 (1st Cir. 1981)).

Yet another factual pattern is one in which the plaintiffs are, as in this case, appointed officials, and the discharge has occurred not as part of a newly-elected administration's assumption of power but was caused by an existing administration because the employee publicly opposed that administration, either on a particular policy issue or with respect to an impending election (*e.g.*, *Sewell v. Machinists*, 445 F.2d 545 (5th Cir. 1971), *cert. denied*, 404 U.S. 1024 (1972)).[2]

The petitioners and the *amici curiae* appearing on their behalf in this Court have approached this case on the premise that the identical rule must govern in several or in all of these contexts. Petitioners press the absolutist position that "the removal from a union position as a result of the expression of political views [always] infringes upon rights protected by 29 U.S.C.A. § 411(a)(1) and (2)" (Pet. Br. at 15), citing on behalf of this proposition cases involving nearly all of the different generic situations described above (*id.* at 14-15). Similarly, *amici curiae* Association for Union Democracy et al.,

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[2] Even more remotely related are situations in which a union member who is *not* an officer or employee claims that the union caused him or her to be discharged from, or not hired for, a position with an entity *other* than the union. Indeed, petitioners in their Brief make allegations of this type. Brief for Petitioners ("Pet. Br.") at 7-9, 32-34. However, the questions whether such alleged economic harassment in fact occurred and, if so, whether an LMRDA violation is thereby established as a legal matter, were neither encompassed by the complaint in this case nor "fairly included" (Rule 21, Supreme Court Rules) in the question presented to this Court for review. *See* Jt. App. 4-6; Petition for a Writ of Certiorari at (i); Pet. Br. at (i); *see also* Pet. App. A 8-9. Therefore, only the propriety of petitioners' discharge *as business agents* is properly before this Court, and we discuss only that question.

while disavowing any *per se* rule as to union employees (Brief of the Association for Union Democracy et al. as Amici Curiae ("AUD Br.") at 22) and recognizing that the situation of elected officers may present substantially different issues (*id.* at 21 n. 18), bases its analysis primarily upon the needs of appointed officials "removed not for supporting defeated incumbents, but rather for speaking out against the superiors who put them in office in the first place," (*id.* at 3). The *amici curiae* justify this deflection of attention from the actual context of *this* case —which, they concede, is one in which there are "attractive" arguments favoring affirmance (*id.*)—on the unjustified assumption that "[i]n this case, the Court will promulgate an authoritative construction of the LMRDA which will govern both situations," (*id.*).

It is the thesis of this brief that any such broad-swathed approach is inappropriate. The central question presented here is whether Congress in enacting Title I meant to establish the equivalent of a civil service system at every level of union staff, forbidding unions to provide in their constitutions for a government responsive to the election returns by assuring a newly-elected administration a free hand in appointing at least the principal union staff. To go beyond an inquiry into Congressional intent upon that issue is to forget that, even though Title I of the LMRDA in some measure draws upon the federal Constitution, in the end—to reverse Chief Justice Marshall's admonition in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316,—it is a *statute* not a constitution, which must be expounded in this case. As such, the courts' task is to " 'reconstitute the gamut of values current at the time when the words were uttered' " (*Woodwork Manufacturers v. NLRB*, 386 U.S. 612, 620, *quoting* Judge Learned Hand)[3], rather than expounding generalizations that may

[3] The full text of Judge Hand's statement on the judicial role in interpreting statutes is set out in Lesnick, *The Gravamen of the Secondary Boycott*, 62 Col. L. Rev. 1363, 1393-94 n.155 (1962).

compromise the available statutory materials when applied to a different situation.

To aid in the task of reconstructing with respect to a concrete situation the frame of reference of the enacting Congress, this Court has developed over the years several modes of inquiry. As we show in Part II of the Argument, two of these are of great aid in divining whether Congress in 1959 intended to prevent newly-elected union officers from choosing on any basis whatever, including personal loyalty and political support in the campaign, key operating staff members, and discharging those previously holding those positions.

The first is the rule that because "words [should be] interpreted as taking their ordinary, *contemporary*, common meanings" (*Perrin v. United States*, 444 U.S. 37, 42 (emphasis supplied)), words with obvious reference to existing legal concepts should be read consistently with the judicial understanding of those concepts at the time the statute was enacted (*id.* at 42-45). Here, because there are legislative indications that Title I of the LMRDA was drawn from the Constitution's Bill of Rights, the state of constitutional law in 1959 concerning issues analogous to that in this case is of great relevance as an indicia of congressional intent. *Brown v. GSA*, 425 U.S. 820, 828; *Moor v. County of Alameda*, 411 U.S. 693, 709.

Secondly, it is also "fundamental that a section of a statute should not be read in isolation from the context of the whole Act." *Richards v. United States*, 369 U.S. 1, 11. Consequently, the construction of § 101(a)(2) in this case should take account of Title IV, the election provisions, and, as well, of other LMRDA provisions in which Congress evidenced a general view of the role of key union staff.

Wherever these indicia of intent might point in the other generic contexts mentioned above, in the present

context, the language of the LMRDA, the evolution of the statute and the legislative debates read in light of these established aids to statutory interpretation demonstrate that petitioners' discharge is not made unlawful by §§ 101(a)(2) & 102.

Before proceeding to the discussion of the legislative and judicial materials pertinent to this particular type of union-official-discharge case, however, we address in Part I of the Argument the contention that Congress itself precluded a context-specific approach by expressly setting out, in § 609 of the Act, 29 U.S.C. § 529, a *per se* rule against any discharge of a union official, elected or appointed, stemming from the exercise of rights protected by Title I, including the right to campaign in union elections. To read § 609 in this way, we demonstrate, would ignore several compelling indications in the statute and its history that the section's proscription of "discipline" was not intended to refer to detrimental action by a union generally, or to removal from an appointed union position particularly. Further, such a construction of § 609 would ascribe to Congress a *sub silentio*, absolutist decision upon a set of questions as to which there are substantial policy considerations on both sides; yet, in enacting the LMRDA, Congress demonstrated a marked tendency to balance the rights created against legitimate union interests, tempering those rights when it was persuaded after due consideration that a *per se* approach would unnecessarily compromise the independence of unions and their ability to function effectively. Since there is absolutely no affirmative evidence that Congress intended a *per se* approach to discharges of union personnel on the basis of expressive activity and considerable evidence to the contrary, reading § 609 as forbidding a context-specific analysis cannot be justified.

ARGUMENT

There was in this case no rule of any kind forbidding petitioners from campaigning during a union election and they did in fact vigorously campaign for the incumbent during the election period. The question, then, is whether as a matter of statutory construction Title I's protection of the right to express "views, opinions and arguments" guarantees appointed union officials who engage in such campaigning the right to retain their union positions regardless of the outcome of that election.

I. Section 609 of the LMRDA Does Not Create a Per Se Rule Against Discharge or Removal of Appointed Union Officials Who Engage in Campaign Activity.

Petitioners' approach to this case is based upon a simplistic syllogism: § 609 of the Act, 29 U.S.C. § 529, forbids "any labor organization, or any officer, agent, shop steward, or other representative of a labor organization, or any employee thereof to fine, suspend, expel, or otherwise discipline any of its members for exercising any right to which he is entitled under [this Act]," and provides a civil cause of action for enforcement of that prohibition. Discharge from a union position is, without more, "discipline," the argument runs, and since members clearly have the right, under Title IV as well as under Title I, to support candidates for union office, discharge of a union employee because of campaign activity becomes, on this construction, a *per se* violation of § 609.

The fatal flaw in this approach is that it assumes that discharge of a union employee is "discipline" within the meaning of § 609. Yet, the language, structure, and history of the statute conclusively demonstrate that "discipline" was *not* intended as a broad term referring to all adverse actions a union might take with regard to a person who is also a member, and, in particular, was *not* intended to refer to discharge of union employees.

First, the thrust of what is now § 609 originated as an amendment offered by the minority in the Senate Committee on Labor and Public Welfare and first officially appeared, as a criminal rather than civil prohibition, as part of § 506 of the version of the Committee bill reported to the Senate. *See*, 86th Cong., 1st Sess., S.1555, as reported, § 506(a), I Leg. Hist. 390; S. Rep. No. 187 on S.1555, 86th Cong., 1st Sess. (1959) at 94, I Leg. Hist. 490 (Minority Views of Senators Goldwater and Dirksen).[4] At the same time the predecessor to § 609 was originally added to that bill, several other additions suggested by the Senate Committee minority which survived to be enacted were added as well. One was the language in § 401(e) which assures each member "the right to vote for or otherwise support the candidate or candidates of his choice, *without being subject to penalty, discipline or improper interference or reprisal of any kind.*" (Emphasis supplied). *See*, S.1555 as reported, *supra*, at § 301(d), I Leg. Hist. 373; S. Rep. No. 187, *supra*, at 92-93, I Leg. Hist. 488-489 (Minority views of Senators Goldwater and Dirksen). Another was an addition to what is presently § 201(a) of the Act, 29 U.S.C. § 431(a) requiring the reporting by unions of

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[4] We note that § 609 was clearly intended to protect against certain reprisals for exercise of rights conferred by Title IV, even though those rights when infringed directly are enforceable only by a suit by the Secretary of Labor to overturn an election. At the time, Title I was not in the bill at all, so that § 506 clearly referred to "rights" other than those conferred by Title I. Statements on the floor of both houses confirm that the provision which became § 609 was expressly understood to be applicable to Title IV generally, and to § 401(e) particularly. II Leg. Hist. 1116 (remarks of Sen. Prouty); II Leg. Hist. 1140-41 (colloquy between Sens. Kennedy & Prouty); II Leg. Hist. 1567 (remarks of Rep. Griffin). *See also* II Leg. Hist. 1233 (remarks of Sen. Kennedy); II Leg. Hist. 1286 (Reprint of Testimony of Sen. Goldwater before the House Committee on Education and Labor subsequent to passage of the Senate bill).

As used herein "Leg. Hist." refers to the National Labor Relations Board's "Legislative History of the Labor-Management Reporting and Disclosure Act of 1959" (G.P.O., 1959).

provisions for "*discipline or removal* of officers or agents" (emphasis supplied).[5] *See* S.1555 as reported, *supra*, § 101(a)(5)(iii), I. Leg. Hist. at 343; S. Rep. No. 187, *supra*, at 89, I. Leg. Hist. at 495 (Minority views of Senators Goldwater and Dirksen). In these two sections of the Act, "discipline" is plainly used as a limited term, synonymous neither with reprisals or penalties for exercise of rights generally, nor with removal from a union position particularly. Otherwise, both sections would be hopelessly internally redundant. There is no reason to suppose that the term suddenly became all-encompassing when the same draftsmen at the same time referred to "discipline" in then-section 506.

Second, the original version of what became the "bill of rights" portion of the Act, Title I, proposed by Senator McClellan, and adopted by a 47-46 vote of the Senate, contained provisions protecting the right to engage in free speech and assembly "without being subject to penalty, discipline or interference of any kind." II. Leg. Hist. 1102, 1119. In addition, Senator McClellan's proposal contained a criminal penalty for willful interference with the rights protected by Title I. Because many Senators concluded, when there was time to read the McClellan amendment more carefully, that it was poorly drafted and "would unduly harass and obstruct legitimate unionism" (II. Leg. Hist. 1233 (remarks of Sen. Church); *see also* II. Leg. Hist. 1229 (remarks of Sen. Kuchel), II. Leg. Hist. 1238 (remarks of Sen. Javits)), a bipartisan substitute amendment was adopted which

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[5] As the reference in § 201(a) to "discipline *or* removal" suggests, our point is *not* that the term "discipline" cannot sensibly be applied to actions affecting officers or employees. For example, we would agree that a union employee deprived of death benefits received as an incident of membership, or forbidden to speak at union meetings *has* been "disciplined" with the meaning of § 609, whether or not the reason for the discipline concerned the person's official duties. Rather, the point is that where the officer or employee is deprived not of incidents of membership but of prerogatives of office, including the position itself, he or she has not been "disciplined" as that term is uniformly used in the LMRDA.

"remove[d] the extremes raised by the amendment of the Senator from Arkansas." II. Leg. Hist. 1234 (remarks of Sen. Cooper). The Kuchel substitute contained § 101 (a) (2) in essentially the form it now appears in the Act.

This sequence has a double significance for present purposes: (a) Senator McClellan's choice of language—referring to "penalty" and "interference" *as well as* "discipline"—indicates once again that "discipline" was not understood as a term encompassing all types of adverse action; and (b) by *rejecting* the McClellan version, Congress necessarily rejected his broad, absolute approach regarding adverse actions based on the exercise of Title I rights of speech and assembly in favor of the more limited prohibition now contained in § 609. *See* II Leg. Hist. 1238 (colloquy between Senators Kefauver and Clark indicating that instead of the provision for penalties in the McClellan amendment, the authors of the substitute intended the provision which became § 609 to apply).[6]

Third, yet another indication that "fine, suspend, expel or otherwise discipline" was not intended to include discharge of union employees is the express legislative history made with regard to the other use of essentially that same phrase in the Act—§ 101(a)(5), assuring procedural protections before a union member can be "fine[d], suspend[ed], expelled or otherwise disciplined." The pertinent language of § 101(a)(5) was part of the McClellan "bill of rights" and then the Kuchel substitute. It is reasonable to suppose, therefore, that the language was taken directly from the predecessor to § 609, which was already in the Bill. In order to remove any possibility of misconstruction that the

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[6] As finally enacted, § 609 provides for civil rather than criminal enforcement. The decision "to temper the remedies" was made in the House of Representatives as part of the Landrum-Griffin substitute (II Leg. Hist. 1568 (remarks of Rep. Griffin)).

"due process" provision might prevent or delay the removal of a corrupt union officer, the Conference Report took care expressly to negate any such reading. H.R. Conf. Rep. No. 1147, 86th Cong., 1st Sess. (1959) at 31, II Leg. Hist. at 935; II Leg. Hist. 1433 (remarks of Sen. Kennedy) ("[A]ll the conferees agreed that this provision does not relate to suspension *or removal* from a union office" (emphasis supplied).)

The leading lower court decision (*Grand Lodge v. King*, 335 F.2d 340 (9th Cir. 1964), *cert. denied*, 397 U.S. 920 (1964)) rests on the view that explicit construction of a parallel and derivative phrase within the same statute is not enough, standing alone, inexorably to substantiate that § 609 does not apply to discharge of union employees. Granting that it is nonetheless true that contradictory interpretations of the same locution within a single statute, while not entirely proscribed, are justified only where there are very strong contextual or historical reasons for believing that Congress used language inconsistently in a single enactment.[7] Since there is no such evidence, the explicit interpretation of § 101(a)(5) strongly confirms the other structural and historical indications, already discussed, that Congress did not intend "discipline" to refer to all adverse actions or in particular to encompass the discharge of union employees. We need not elaborate this critique of *King's* reasoning further for *our* analysis closely follows that of Judge Stevens' concurring opinion in *Wood v. Dennis*, *supra*, 489 F.2d at 857-858.

There are, then, numerous indications in the statute and its history that controvert the contention that Congress enacted § 609 as a *per se* ban upon discharging union officials on the basis of any actions declared by the statute to be a right of union members. Perhaps even

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[7] In *King*, *supra*, the court was apparently unaware of the other, narrow uses of the term "discipline" in the statute, and, as well, of the narrow use of that term in the rejected McClellan version of Title I.

more significant is what is *not* evident—namely, *any* specific reference in the legislative history to discharge of union employees because of campaign activity as an abuse needing correction.[8]

This Court has recognized in the constitutional context that "it cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it posses in connection with regulation of the speech of the citizenry in general." *Pickering v. Board of Education*, 391 U.S. 563, 568. The union *qua* employer has similar interests. To read § 609 as creating a *per se* prohibition upon employee discharges based in any way on protected speech activity would be to ascribe to Congress an unarticulated decision uniformly to compromise those interests. Yet, in those instances in which legitimate countervailing union interests *were* raised and discussed, Congress often responded by suitably qualifying or limiting a right conferred by the bills. For example, as discussed above both the Kuchel substitute for the McClellan "bill of rights" and the legislative history interpretation of § 101(a)(5) were the result of a concern that the rights created not be so broad as to impede ability of unions to function effectively. It would be paradoxical to ascribe to Congress an intent to create a *per se* rule when no abuse was identified and where there are powerful countervailing practical considerations to which legislators would have been particularly sensitive.

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[8] *Amici Curiae* Association for Union Democracy et al. does cite a few "remarks in the Congressional debates [which] reveal . . . [an] assumption that union officials *would be among the potential plaintiffs* under the Bill of Rights." (Emphasis supplied.) AUD Br., at 5-6 & n.4. But as we have noted (n.5, *supra*), the questino here is whether union employees are protected *from discharge* based on the exercise of § 101(a)(2) rights, not whether they are protected *at all* by that section from such actions as loss of membership, union fines, etc.

II. Discharge by a Newly-Elected Administration of a Union Official Who Has Engaged in Campaign Activity Does Not "Infringe" the Free Speech Rights Protected by § 101(a)(2) of The LMRDA.

To conclude that the LMRDA contains no *per se* rule against discharges of union employees who have engaged in expressive activity is not to decide the issue presented in this case. For, the question remains whether in this *particular* context the discharge "infringes" the employee's free speech and assembly rights under § 101(a)(2); if so, there would be a cause of action under § 102, 29 U.S.C. § 412, which prohibits such violations. The problem, then, is to decide whether the Congress that passed the LMRDA would have considered that petitioners' right to campaign in union elections was "infringed" by their later discharge when the candidate they had vigorously opposed took office.

A. As its title—"Bill of Rights of Members of Labor Organizations"—would indicate, the starting point for Title I was the first ten amendments to the federal Constitution. See, *e.g.*, II Leg. Hist. 1103 (remarks of Sen. McClellan). Indeed proponents of Title I in its final form stressed as a reason for supporting the Title that certain of the traditional, well understood rights of citizenship could safely be transposed, suitably adjusted, to the union context. "These basic guarantees *are hardly new or novel*—they are essential and fundamental rights which every American citizen is guaranteed in the Bill of Rights of the Federal Constitution." (II Leg. Hist. 1566 (remarks of Rep. Griffin) (emphasis supplied)). But Congress made a conscious judgment to place suitable limits on these guarantees. A major reason for the success of the Kuchel substitute was the desire to provide appropriately qualified, rather than absolute, rights of speech and assembly. See II Leg. Hist. 1230-31 (remarks of Sen. Kuchel); II Leg. Hist. 1117 (remarks of Sen. Javits). By virtue of that

substitute, the Act expressly permits "reasonable" rules of certain kinds to limit the rights of free expression accorded members. It is now well settled that in the First Amendment context it is not enough that limitations be "reasonable"; rather, they must be "necessary" to a "compelling" state interest. Thus, § 101(a)(2) on its face is narrower than the present First Amendment law.

With this limitation in mind and keeping sight of the assurance that Title I did not create "new or novel" rights, the proper place to begin is the 1959 understanding with regard to analogous issues concerning the situation of public employees under the Constitution. Cf. *Perrin v. United States, supra* (in interpreting statute passed in 1961 and permitting federal criminal prosecution for some cases of bribery, the understanding of the meaning of the term "bribery" as of 1961 is central); *Brown v. GSA, supra*, 425 U.S. at 828; *Moor v. County of Alameda*, 411 U.S. 693, 709.

As of 1959, this Court had never addressed the question whether states and municipalities could allow a newly-elected officer holder to freely choose his subordinates, based on their campaign activities and their policy views as well as on any other other reason, and to discharge incumbent officeholders on a similar basis. Considering the state of constitutional doctrine at the time concerning the First Amendment rights generally of public employees, the absence of any law directly on that subject is not surprising. For, only seven years previously, the Court had ruled, in *Adler v. Board of Education*, 342 U.S. 485, 492, that:

> It is clear that such persons have the right under our law to assemble, speak, think and believe as they will. *American Communications Ass'n v. Douds*, 339 U.S. 382. It is equally clear that they have no right to work for the State in the school system on their own terms. *United Public Workers v. Mitchell*, 330

> U.S. 75. They may work for the school system upon the reasonable terms laid down by the proper authorities of New York. If they do not choose to work on such terms, they are at liberty to retain their beliefs and associations and go elsewhere. Has the State thus deprived them of any right to free speech or assembly? We think not.

Adler was the most sweeping statement of the right/privilege doctrine as applied to public employees, the demise of which began in a small way later that same year in *Wieman v. Updegraff*, 344 U.S. 183. But, *Wieman* did *not* hold that simply discharging a public employee because of activity which could not under the First Amendment be directly proscribed is unlawful unless the Government is able to demonstrate "an overriding interest * * * of vital importance." Contrast *Branti v. Finkel*, 445 U.S. 507, 515-516. That approach to the First Amendment rights of public employees was still years away. Rather, *Wieman* stressed that an employee discharged for "disloyalty" had lost more than simply a job:

> There can be no dispute about the consequences visited upon a person excluded from public employment on disloyalty grounds. In the view of the community, the stain is a deep one; indeed, it has become a badge of infamy. Especially is this so in time of cold war and hot emotions when "each man begins to eye his neighbor as a possible enemy. [344 U.S. at 191.]

And, *Wieman*, far from applying the exacting scrutiny appropriate to First Amendment jurisprudence, concluded only that exclusion from public employment on disloyalty grounds cannot be accomplished under a "patently arbitrary or discriminatory" statute. *Id.* at 192.[9]

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[9] In hindsight, one may be able to see the outlines of present First Amendment doctrine regarding discharge of public employees for reasons related to speech activity in a case decided the year before the LMRDA was enacted—*Speiser v. Randall*, 357 U.S. 513. But *Speiser* dealt not with discharge from public employment,

Given the general First Amendment doctrine applicable to public employees, it is not surprising that upon the particular issue implicated by this case—whether and under what circumstances a newly elected administration may discharge public employees because of their support for the opposition in a campaign and in order to make way for employees personally and politically loyal to the new regime—no court until 1972 had, so far as we are aware, ever held that public employees' constitutional rights are infringed by patronage discharges. *Illinois State Employees Union v. Lewis*, 473 F.2d 561 (7th Cir. 1972). This was true even *after* First Amendment doctrine had developed to the point that litigants had the temerity to raise such a question. *See Alomar v. Dwyer*, 447 F.2d 482, 483 (2nd Cir. 1971), *cert. denied*, 404 U.S. 1020 (1972); *American Federation of State, County and Municipal Employees v. Shapp*, 442 Pa. 527, 280 A.2d 375, 378 (1971); *Norton v. Blaylock*, 409 F.2d 772 (8th Cir. 1969), *affirming* 285 F. Supp. 659 (W.D. Art. 1968). And, it was not until 1976 that this Court, in *Elrod v. Burns*, 427 U.S. 347 (1976), *held*, 5-3, that there are circumstances in which the First Amendment protects against patronage discharges, even though, "[a]s the plurality opinion recognize[d], patronage practices of the sort under consideration here have a long history in America." 427 U.S. at 377 (Powell, J., concurring).[10]

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but with "the denial of a tax exemption * * * [which] is frankly aimed at the suppression of dangerous ideas." *Id.* at 519. Only *after* 1959 did the Court begin to explore *Speiser*'s implications for public employees. *Shelton v. Tucker*, 364 U.S. 479; *Torcaso v. Watkins*, 367 U.S. 488; *Keyishian v. Board of Regents*, 385 U.S. 589; *Pickering, supra*, 391 U.S. at 568; *Elrod v. Burns*, 427 U.S. 347; *Branti v. Finkel, supra*. And, *Adler* was not expressly overruled until *Keyishian, supra*, 385 U.S. at 606.

[10] We are not suggesting, for we believe it to be incorrect, that a transportation to the union context of the constitutional test applicable to patronage discharges under *Elrod*, and *Branti v. Finkel, supra*, would result in upholding petitioners' claim in this

Thus, however direct the line from *Wieman v. Updegraff* and *Speiser v. Randall* to *Branti v. Finkel* may now appear in retrospect, it would have taken extraordinary prescience to have anticipated that progression of constitutional doctrine in 1959. The fair conclusion is that given the understanding of the First Amendment when the LMRDA was passed, Congress, if presented with

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case. For, the ground for petitioners' discharge was not simply passive affiliation with an adverse political faction as it was in *Elrod* and *Branti*, but active campaigning in a bitter and hard-fought campaign. Compare *Branti, supra*, 445 U.S. at 520, n.14. And, business agents, whether or not they can be characterized as "confidential" or "policy-making," are expressly recognized in the LMRDA to be "key administrative personnel" (§ 3(g), 29 U.S.C. § 402(g)) who "occupy positions of trust in relation to such [labor] organization and its members as a group" (§ 501(a) 29 U.S.C. § 501(a)). *See* n.1, *supra*.

Under these circumstances, we would expect that "the hiring authority [the union] [could] demonstrate that [campaign support] is an appropriate requirement for the effective performance of the * * * office * * *" *Branti*, 445 U.S. at 518. It is probably the case that petitioners' "employment relationships with the [Union President] * * * [are] the kind of close working relationships for which it can persuasively be claimed that personal loyalty and confidence are necessary to their proper functioning" (*Pickering*, 391 U.S. at 570) so that general policies directives can be translated into implementation in the key daily affairs of the union. Also, with regard to negotiations particularly, known opposition to the incumbent administration could undermine a business agent's effectiveness even if he conscientiously sought to subordinate his own beliefs to the demands of the job. The employers' bargaining posture might take into account the possibility that the negotiator does not have the full confidence of the officer who must ultimately approve the contract.

For all these reasons, we would expect that, after trial, if not upon summary judgment, the defendants in this and similar cases could show that campaign opposition is as "appropriate" a basis for disqualification for a union business agent, entrusted with representing the union to the outside world, as it is for a gubernatorial aide who "writes speeches, explains [the governor's] views to the press, or communicates with the legislature." *Branti*, 445 U.S. at 518.

the problem, would have considered decidedly "new or novel" the notion that free speech rights of an appointed official, serving at the will of an elected officer, could be "infringed" by a post-election discharge based upon the appointee's expressed opposition to the officer's candidacy during an election campaign.[11] See also *Wood v. Denis*, *supra* (Stevens, J., concurring).

B. It is said, however, that because a central goal of the Act as a whole is "to have democratically responsive unions [by providing] * * * the opportunity to influence policy and leadership by free and periodic elections" (S. Rep. No. 187, 86th Cong., 1st Sess. (1959) at 7, I Leg. Hist. 403), appointed union staff must be protected from discharges for campaign activity in order to provide a potential for challenge to "entrenched" union leadership. *See* AUD Br. pp. 9-12. This argument, however, while correct in its premise—that Congress was concerned with assuring that a union's leadership reflects accurately the will of the members—is in error in its conclusion. It is sufficient that no such view of the role of appointed officials was generally current at the time or stated in the LMRDA debates. Moreover, as we now show when con-

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[11] Whether this same conclusion applies with respect to statutory *elected* "officers" is another matter. Unlike the right to hold appointed union position, which is not expressly alluded to in the Act at all, the LMRDA, in Title IV not Title I, *does* give union members the rights "to be a candidate and to hold office" (§ 401(e), 29 U.S.C. § 481(e)). This means that in terms of the then governing constitutional "right-privilege" doctrine, holding elected union office may well have been considered a "right" rather than a "privilege." Also, by requiring that certain officials be elected (§ 3(n), 29 U.S.C. § 402(n), § 401, 29 U.S.C. § 481), and providing that members have "the right to vote for * * * candidates of [their] choice" (§ 401(e), 29 U.S.C. § 481(e); *see also* § 101(a)(1), 29 U.S.C. § 411(a)(1)), Congress indicated that any interest in political or policy conformity among LMRDA "officers" is entitled to little or no weight. Removal of elected LMRDA "officers" on the basis of campaign or policy positions might on these cases meet the pre-1959 "patently arbitrary or discriminatory" test of *Wieman v. Updegraff*. See also n.9, *supra*.

sidered in "the context of the whole Act" (*Richards v. United States, supra*, 369 U.S. at 11), it becomes clear that the statutory concept of responsive government[12] is furthered rather than impeded by permitting newly-elected officers a free hand in choosing staff such as business agents.

While stressing the importance of protecting the responsiveness of union governance, Congress at the same time made a conscious decision to define those officers who *must* be elected as including only "any constitutional officer, any person authorized to perform the functions of president, vice president, secretary, treasurer, or other executive functions * * * and any member of its executive functions * * * and any member of its executive board or similar governing body," (§ 3(n), 29 U.S.C. § 402(n), § 401, 29 U.S.C. § 481). This definition was expressly understood *not* to include many responsible union officials, including, *inter alia* "business agents" of the traditional variety. See II Leg. Hist. 1087-1096 (discussion of the definition of "officer" now contained, in slightly different form, in § 3(n) of the Act.) The effect of this decision was to permit business agents and similar officials to be elected, by designating them as "officers" in the union's constitution, or to permit said officials to be appointed by not so designating them. This compromise was reached even though it was asserted that much of the undemocratic conduct against which the bill was principally directed involved non-elected business agents. As Senator Mundt put it, "[A] great many of these problems involve the business agents." II Leg. Hist. 1091.

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[12] Responsiveness of union officers to the will of the members was thought to be of particular importance with regard to two of the principal areas of petitioners' responsibilities, collective bargaining and processing grievances. "The Government which gives unions [exclusive] power [in these areas] has an obligation to insure that the officials who wield it are responsive to the desires of the men and women whom they represent." S. Rep. No. 187, *supra*, at 20, I. Leg. Hist. 416.

If petitioners' position were upheld, such appointed officials would be entitled to remain in office after an entirely new administration was elected, even if those officials were part and parcel of the administration the membership had disavowed in the election and even if the appointed officials' performance had been a central issue in the campaign and in the members' decision to repudiate the incumbent elected officers. Of course, unions could avoid this result by mandating in their constitutions that business agents be elected as well. But § 3(n) of the LMRDA was drafted precisely to preserve to union members the right to determine in their bylaws what their union's internal structure should be in this regard. There is no indication whatever that as petitioners and the *amici curiae* on their side argue this choice was limited to one between a permanent "civil service" at all levels of union staff and election of all officials with any degree of functional independence whatever. Rather, a third alternative—election by proxy of staff such as business agents, by giving newly-elected officers an entirely free hand in their selection—is an option that accords fully with both Congress' responsiveness concerns *and* the choice Congress left to unions regarding election of officers.

The legislative materials are inconsistent for another reason with an intent to limit the alternatives open to unions seeking to establish a responsive yet efficient governmental structure. Throughout the legislative process Congress evidenced an intention to *avoid* dictating to unions upon their internal structure, provided that essential democratic safeguards were assured. *See, e.g.*, S. Rep. No. 187, *supra*, at 7, I Leg. Hist. 403; cf. *Wirtz v. Glass Bottle Blowers Assoc.*, 389 U.S. 463, 440-71 & nn. 9 & 10. Of particular relevance in this regard is the Senate debate in 1958, when that body, but not the House, passed the "Kennedy-Ives" Bill, upon which most of Title IV of the LMRDA is based. *See* S. Rep. No. 187, *supra*, at 2, I Leg. Hist. 39. At that time, a detailed amendment designed to prescribe a means of removing

elected officers was proposed. 104 Cong. Rec. 11184 (June 14, 1958). In the debate on this proposal, Senator Ervin objected on the grounds that:

> [The] Senate [should not] write a constitutional bylaw which would be regained by all the unions in the country. [We should not] have the Senate write some of the minutiae as to how the constitutions and bylaws of unions would operate * * * [I]t would introduce chaos into the operations of unions. [104 Cong. Rec. 11190 (remarks of Sen. Ervin).]

On the basis of this view, Senator Ervin introduced a substitute amendment which required that there be *some* means of removing elected officers for cause, but did not specify the structure for accomplishing this end. *Id.* at 11205. This substitute, which passed, became the model for § 401(h) of the Act, 29 U.S.C. § 481(h).[14]

The rejection of the detailed recall provision was based on a recognition that "each of us, depending on his own personal philosophies, has a different concept of the democratic process * * * "[T]o tell people that they must have in their bylaws and their constitution * * * [is not] a democratic procedure." 104 Cong. Rec. 11197 (remarks of Sen. Pastore). Indeed, the direct recall proposal was objected specifically on the ground that it is "a mistake to

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[14] Section 401(h) provides:

> Removal of officers guilty of serious misconduct
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> (h) If the Secretary, upon application of any member of a local labor organization, finds after hearing in accordance with the Administrative Procedure Act that the constitution and bylaws of such labor organization do not provide an adequate procedure for the removal of an elected officer guilty of serious misconduct, such officer may be removed, for cause shown and after notice and hearing, by the members in good standing voting in a secret ballot conducted by the officers of such labor organization in accordance with its constitution and bylaws insofar as they are not inconsistent with the provisions of this subchapter.

ask for a higher degree of democracy in a trade union * * * than is practiced in our own Government." *Id.* at 11187 (remarks of Sen. Neuberger); see also *id.* at 11191 (remarks of Sen. Ervin). Against that background it is extraordinarily unlikely that in the related area of the tenure of appointed officials, Congress without so stating intended to prescribe the "concept"—contrary to the then prevailing political practice—that appointed officials are insulated from the election returns.

CONCLUSION

For the reasons stated above, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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